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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1016

UNITED STATES ALKALI EXPORT ASSOCIATION, INC., *et al.*,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

No. 1017

CALIFORNIA ALKALI EXPORT ASSOCIATION, *et al.*,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The government brief is in agreement with our own on so many points that the issue, although important, is brought within a narrow range.

That issue is whether the Webb-Pomerene Act brings into play the principle that where a subject-matter has been entrusted to a Commission, jurisdiction to litigate in the Courts is ousted until the Commission shall have acted.

The problem is one of statutory interpretation.

It is not the problem of examining the statute to see whether it explicitly ousts jurisdiction of the Courts or

repeals some earlier statute. The rule of primary and exclusive jurisdiction in administrative bodies has never depended upon express provision therefor in the statute. It is a rule which this Court has fashioned to give full effect to the presumed intent of Congress. *Myers* v. *Bethlehem Steel Corporation*, 303 U. S. 41. *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125.

The problem of statutory interpretation is whether the particular statute has in fact entrusted the problem in question to the jurisdiction, supervision and control of a Commission. The Courts then supply the supporting rule that they will not entertain jurisdiction over the same problem until the Commission shall first have acted.

A number of the arguments suggested by the government are beside the mark. Thus, it can make no difference that the Commission has other functions of investigatory and advisory nature, or other functions in respect of which an appeal to the Courts is expressly provided upon a different principle (that the findings of the Commission if supported by evidence shall be conclusive and that the appeal shall be one of law), or that the Congress had made a different provision for supervision of this particular field during the twenty years prior to the passage of the Webb-Pomerene Act, or that this becomes one of the cases in which the Attorney General takes his action after one of the executive agencies of the government has acted rather than of his own motion, or that when he does act the Attorney General is left free to determine the manner of his action.

These arguments have validity only if it can be said that the meaning of a statute can be disregarded when its effect would otherwise be to change a law theretofore ex-

isting. Such an argument carries its refutation on its face. The Congress is free to fashion the appropriate statute for each need.

The one element that appears to us to be missing in the government brief is the one element which we submit should be determinative, viz. a careful examination of the statute as an entirety and an objective effort to apply its terms. As we went into such an analysis at length in our original brief, we need not repeat it here. It leads inescapably to the conclusion that the Congress carefully framed a statute covering the whole substantive field of § 1 of the Sherman Act, and then with equal care added precise provisions to insure that the whole field should be under the jurisdiction and control of the Commission, with provision for reference to the Attorney General *after* the Commission should have acted. Thus construed, the statute is a perfectly normal exercise of a Federal power, particularly where the power is directed to foreign commerce, with a collateral effect upon domestic commerce. It is the normal governmental procedure of entrusting supervision and control to one of the agencies of the government, and then providing for a reference by that agency (when the agency itself should see fit) to the Attorney General to perform his normal function of law enforcement.

It is not repugnant to our form of government to provide that the Attorney General shall have a law enforcement function but to withhold from him in a particular field the determination whether the machinery of law enforcement shall be put into motion.

The Department of Justice is not a branch of the government independent of the other executive branches and entitled to make its own policies.

The history of this particular legislation was that there was first passed a statute (the Sherman Act) empowering the Attorney General to bring a certain type of litigation which he had not theretofore been empowered to bring, and that there was later passed a statute entrusting one field expressly to a Commission with power of reference by the Commission to the Attorney General, after which he might conduct in his own discretion litigation of the same character.

The natural interpretation of the second statute, especially when made in the light of the settled principles favoring non-interference by the Courts with the functions of administrative bodies, is to say that the Attorney General may not act until after the reference to him thus specifically provided for.

That this is the natural interpretation, is recognized by the government in its brief, when it opens with the argument that the statute is to be construed as providing a new and merely auxiliary jurisdiction to the Commission, and not to have in any way affected the jurisdiction of the Attorney General. But this is just the argument that was unsuccessfully made by all the private parties who failed in cases of the *Myers* v. *Bethlehem Steel Corporation* type. In each of those cases the argument ran that there was an established and recognized procedure in the Courts and that the administrative statute in question had not provided for its repeal. If the Attorney General is not to be limited by the same argument, it can only be because there is a special exemption in his favor from the general rule applicable to administrative bodies. Congress did provide such an exemption in § 11 of the Clayton Act, discussed in

Georgia v. *Pennsylvania R. R. Company*, but it has not made such a provision in the Webb-Pomerene Act.

We believe that the case must, therefore, ultimately turn upon the basic question as to whether there is anything inherent either (1) in the Sherman Act which distinguishes it from any other Federal statute, or (2) in the position of the Attorney General which distinguishes him from any other litigant.

First. While recognizing the expressions of high esteem which this Court has accorded to the Sherman Act on many occasions, we do not suppose for a moment that this Court proposes to hold that there is any legally operative distinction between the Sherman Act and any other statute. The essence of the Sherman Act was that it confer a jurisdiction upon the Federal Courts. But that jurisdiction is no greater than any other jurisdiction to which the principle of exhaustion of administrative remedies has been applied. The Sherman Act, albeit that it has some of the breadth of a constitution, certainly does not have the power of a constitution to be superior to other statutes.

Second. There is a fundamental principle of our Anglo-American administration of justice that the Attorney General has no greater standing before the Courts than any other litigant and that he derives his powers, like other litigants, from the common law or from statute. In this case he finds his power in the Sherman Act, and finds the limitation upon his power in the Webb-Pomerene Act, interpreted in the light of the governing principles that had been applied to all litigants who had sought the jurisdiction of the Courts before the exhaustion of an administrative remedy provided by statute.

With great respect to the Attorney General, we suggest that what he has overlooked is that it is within his power and function, as law enforcement officer and a member of the executive branch of the government, to call to the attention of the other branches any supposed wrong of which he may have become cognizant. Thus, the government brief states here (off the record of course) that this action was based upon an investigation made by the Department of Justice rather than by the Federal Trade Commission. Assuming that fact, there is no reason why the Attorney General should not have called the attention of the Federal Trade Commission to the results of its investigation and put those results at its disposal, with a view to its functioning in the manner which the Congress contemplated when it added the two last paragraphs to § 5 of the Webb-Pomerene Act.

Indeed, if the Commission had then concluded that the Associations ought to make the same revision in their method of doing business which is now sought to be obtained by decree of the District Court, it would have recommended to them that they do so, and in the event that they had not thereupon done so, would doubtless have referred the matter back to the Attorney General for exercise by him in his discretion of his proper function of law enforcement. We do not share the Attorney General's view that there is something inherently wrong in confining him to his proper functions. Compare his brief at p. 37:

> "The Attorney General and the courts would operate, in other words, as mere agencies for enforcing the Commission's determinations; and the long-continued policy of leaving violations of the Sherman Act to judicial determination would, as to

violations of the Act by export associations and their members, be reversed."

We wonder whether the Attorney General has realized the implications in his argument. He is saying (1) that there is something wrong in the law enforcement officer of the government acting merely as an agency for enforcing the determinations of a branch of a government to which the Congress has entrusted responsibility, (2) that there is something wrong in the Courts being confined to such enforcement, (3) by inference that he himself and the Courts should be free to make policy, and (4) that they may find the justification for so doing in the fact that they had earlier been entrusted with such a power.

It was a very familiar argument with this Court in the years prior to about 1937 that there existed one or another inherent type of jurisdiction in the Federal Courts, and particularly in the Federal Equity Courts, which they might exercise regardless of various express Congressional enactments purporting to entrust primary responsibility to other government agencies. It was an argument which, although appealing to some members of this Court at an earlier date, has now come to be steadfastly rejected. We do not suppose that the Attorney General occupies in this respect a position any different from that of any other party which might appeal to older statutes and older procedures in the effort to frustrate a later Congressional policy.

This Court has said too often that its sole function, subject to the Constitution, is to interpret the law as Congress lays it down for it to be argued at this late date that there is some inherent sanctity in a "long continued policy

of * * * judicial determination" to which appeal may be made against more modern provisions of statute.

Respectfully submitted,

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